(28)

No. 04-1152

Supreme Court, U.S.
FILED
SEP 21 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STUDENT/FACULTY ALLIANCE FOR MILITARY EQUALITY ("SAME") AND OUTLAWS IN SUPPORT OF RESPONDENTS

CARMINE D. BOCCUZZI, JR.
Counsel of Record
Catharine M. Clark
Kyle C. Wong
CLEARY GOTTLIEB
STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000
Counsel for Amici Curiae

September 21, 2005

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Principle And Practice Of Nondiscrimination At Yale Law School	6
II. The Enforcement Of The Solomon Amendment Against Yale Law School	11
III. The Solomon Amendment Is Unconstitutional	15
A. The Solomon Amendment Unconstitutionally Infringes *Amici's* First Amendment Rights	15
1. *Amici's* Right To Expressive Association Has Been Violated	15
2. *Amici's* Right To Receive Information Has Been Violated	19
3. The State Interest Does Not Satisfy Strict, Or Even Intermediate, Scrutiny	21
B. The Solomon Amendment Unconstitutionally Chills Speech	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	*Page*
Baggett v. Bullitt, 377 U.S. 360 (1964)	26, 28
Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982)	20, 21
Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)	*passim*
Burt v. Rumsfeld, 322 F. Supp. 2d 189 (D. Conn. 2004)	4, 12, 14
Burt v. Rumsfeld, 354 F. Supp. 2d 156 (D. Conn. 2005)	*passim*
City of Chicago v. Morales, 527 U.S. 41 (1999)	28
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	25
Edenfield v. Fane, 507 U.S. 761 (1993)	25
Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004)	*passim*
Gay & Lesbian Law Students Ass'n v. Bd. Of Trs., 673 A.2d 484 (Conn. 1996)	13
Grutter v. Bollinger, 539 U.S. 306 (2003)	16-17
Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967)	20-21
Lloyd v. Grella, 83 N.Y.2d 537 (1994)	13
NAACP v. Button, 371 U.S. 415 (1963)	29
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	18

	Page
O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996)	23
PG&E v. Pub. Utils. Comm'n of Cal., 476 U.S. 1 (1986)	20
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	*passim*
Searcey v. Crim, 642 F. Supp. 313 (N.D. Ga. 1986), *aff'd in part, vacated in part*, 815 F.2d 1389 (11th Cir. 1987)	24
Shelton v. Tucker, 364 U.S. 479 (1960)	22
Texas v. Johnson, 491 U.S. 397 (1989)	30
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)	25
Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976)	20, 21
W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	30

Statutes and Regulations

10 U.S.C. § 983(b)	1, 26
10 U.S.C. § 983(b)(1)	26
10 U.S.C. § 983(c)(2)	24

Page

Other Authorities

Declaration of Michael Alsdorf, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) 8

Declaration of Lea Bishop, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) 14

Declaration of Theresa Bryant, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (3:03-CV-1777 (JCH)) ..... *passim*

Declaration of Robert Burt, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (3:03-CV-1777 (JCH)) ..... *passim*

Declaration of Darren Cohen, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) 1-2, 15, 27

Declaration of William N. Eskridge, Jr., *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (03-4433) 6-7, 10, 12

Declaration of Owen Fiss, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (3:03-CV-1777 (JCH)) 6, 10, 15, 17

Declaration of Fadi Hanna, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) ..... *passim*

Page

Declaration of Elizabeth L. Hillman, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (3:03-CV-1777 (JCH)) 9-10, 20

Declaration of Michael Kavey, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) 2, 21

Declaration of John Maloney, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (3:03-CV-1777 (JCH)) 22

Declaration of Barbara Safriet, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (3:03-CV-1777 (JCH)) ..... *passim*

Declaration of Heather Sias, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) 9

Declaration of Adam A. Sofen, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) 7, 11

Declaration of John Tye, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (3:03CV1867 (JCH)) 10-11

Declaration of Kenji Yoshino, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (3:03-CV-1777 (JCH)) 14-15

Earlham College, College Policies and Guidelines, Jan. 7, 2005, http://www.earlham.edu/policies/rel-life.html 24

Obituaries, Kan. City Star, Apr. 22, 2003 24-25

Page

Other Federal Materials

H.R. Rep. No. 108-433, pt.1 (2004).....26-27, 27-28

140 Cong. Rec. H3860-63 (May 23, 1994)
(statement of Rep. Pombo)..... 8

140 Cong. Rec. H3860-63 (May 23, 1994)
(statement of Rep. Solomon)..... 22-23

150 Cong. Rec. H1702-01 (daily ed.,
Mar. 30, 2004) (statement of Rep. McKeon) .. 27

Student/Faculty Alliance for Military Equality ("SAME") and OutLaws respectfully submit this *amicus curiae* brief in support of Forum for Academic and Institutional Rights ("FAIR"), *et al.*, Respondents. Pursuant to Rule 37.3(a) of the Supreme Court Rules, this brief is filed with the consent of the parties.[1]

INTEREST OF THE *AMICI CURIAE*

Amici curiae are two official law school organizations who filed suit seeking an injunction to prevent the Department of Defense ("DOD") from enforcing the Solomon Amendment, 10 U.S.C. § 983, against Yale Law School. On January 31, 2005, in a companion case, Yale Law School professors won a permanent injunction against the DOD, effectively mooting the students' case. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005). A short time before this decision, the Third Circuit Court of Appeals granted a nationwide preliminary injunction against the enforcement of the Solomon Amendment in *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) ("*FAIR* case"). *Amici* support the decision in the Third Circuit and respectfully submit this *amicus curiae* brief, both as students with a unique perspective on the importance of the nondiscrimination policy and on the harm to *amici's* First Amendment rights caused by the Solomon Amendment, and also as litigants who have tested the government's case.

SAME is a student organization at Yale Law School formed in response to the school's forced waiver of its nondiscrimination policy for military recruiters. *See* Declaration of Darren Cohen, dated Feb. 18, 2004, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) ("*SAME* case") ("Cohen Decl.") ¶¶ 3, 9 ("SAME is . . . committed to

---

[1] *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than *amici*, their members or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of Court.

education and activism in support of the Yale Law School nondiscrimination policy."). SAME is an active and diverse organization that is comprised of students of all races, religions, genders and sexual orientations. *Id.* ¶11. SAME professes no opinion, pro or con, regarding the historic or current mission of the military except as to its continued discrimination against gays and lesbians. In fact, certain members of SAME would be proud to serve in the armed forces were it committed to full equality. *See infra* at I.

OutLaws is a student organization at Yale Law School for lesbian, gay, bisexual and transgender ("LGBT") students. At the time litigation began, OutLaws had 30 official members. Declaration of Michael Kavey, dated Feb. 18, 2004, *SAME* case ("Kavey Decl.") ¶¶1, 5. Today, OutLaws has about twice as many members, almost all of whom identify as gay, lesbian or bisexual. The organization creates a social forum for LGBT students and educates members of the Yale Law School community and others about issues affecting LGBT persons. *Id.* ¶4. As an official student organization, OutLaws abides by, and advocates, the policy and practice of nondiscrimination. *Id.* ¶¶7, 11.

Amici are concerned that a reversal of the Third Circuit's decision will effectively abrogate Yale Law School's nondiscrimination policy as it applies to sexual orientation. The *SAME* case and the related *Burt* case—which were litigated through summary judgment—demonstrate the unconstitutionally overbroad manner in which Petitioners wish to enforce this law and highlight the inaccuracies in Petitioners' submissions to this Court:

- Contrary to Petitioners assertions, *see* Brief for the Petitioner's, dated July 19, 2005 ("Pet. Br.") at 37, military recruiters do not seek treatment equal to other employers, but demand the undeniably *special* treatment of exemption from Yale Law School's consistently applied nondiscrimination policy. Unlike every other employer, Petitioners

wish to discriminate against student members of *amici* and nevertheless participate in the official law school recruiting program.

- Despite having agreed to accommodations during the 1990s—accommodations that gave the military access to Yale Law School students as required by the Solomon Amendment—the DOD now claims that nothing short of special treatment can serve their recruiting needs.
- While Petitioners repeatedly state that if institutions like Yale Law School wish to apply a nondiscrimination policy consistently, they can simply choose not to "associate with the government's money," *see* Pet. Br. at 12, Yale Law School receives no federal funding. Accordingly, the threatened withdrawal of almost $300 million in federal funding is nothing more than a blunderbuss punishment directed at the entire university as retribution for the exercise of First Amendment rights by Yale Law School students and faculty.

Amici's Litigation Against Petitioner Rumsfeld in the District of Connecticut

In 1978, at the behest of a few of its courageous students, Yale Law School amended its nondiscrimination policy to prohibit discrimination on the basis of sexual orientation. Consistent with this policy, which directly benefits and protects students, only employers who certify that they do not discriminate on the basis of any protected category, including sexual orientation, are permitted to participate in the official Yale Law School recruiting programs.[2] That policy

[2] The nondiscrimination policy forbids discrimination based on age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender, sexual orientation and marital, parental and veteran status; it is at the heart of Yale Law School's mission and guides all official law school activities. Declaration of Robert Burt,

governed recruiting at Yale Law School for years without exception until the military abruptly changed its tune and forced its way into the program.

In 2001, despite the government's past satisfaction with access to students and campus, the military, through its Judge Advocate General's Corps ("JAG"), sought to participate in the school's official interview program without signing the required nondiscrimination statement. As with all other employers who refuse to sign this statement, the military was not allowed to participate in the official interview program. In response, the DOD informed Yale Law School that its nondiscrimination policy violated the Solomon Amendment. The government then threatened to withdraw almost $300 million in federal funding from the rest of the university. In light of this unprecedented coercion, on September 4, 2002, the faculty of Yale Law School voted to suspend the nondiscrimination policy temporarily and to permit the military to participate in the official law school recruiting program. Burt Decl. ¶¶19-22.

As sexual orientation was added as a protected category to the nondiscrimination policy at the behest of students, it is not surprising that students took action to remedy the suspension of a nondiscrimination policy designed to protect them and to stop the government's interference with the school's message of nondiscrimination. In 2003, both SAME and OutLaws filed suit against the DOD to enjoin enforcement of the Solomon Amendment.

At the same time, in response to the continued threats of the government to withdraw funding to the entire university, forty-four Yale Law School faculty members filed suit on October 16, 2003. *Burt*, 322 F. Supp. 2d 189. The faculty members asserted that the Solomon Amendment unconstitutionally violated their First and Fifth Amendment rights. *Id.*

---

dated Apr. 6, 2004, *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) ("*Burt* case") ("Burt Decl.") ¶¶ 6, 7.

The district court agreed with the faculty that the Solomon Amendment both unconstitutionally compelled speech and interfered with the faculty's message as an expressive association. *Burt*, 354 F. Supp. 2d at 182-83, 187. Based on these conclusions, the court held that "the Solomon Amendment is hereby declared unconstitutional as applied, and the defendant is enjoined from enforcing it." *Id.* at 189-90.

The *Burt* court's conclusion that the Solomon Amendment is unconstitutional is correct. As the legislative history demonstrates, the statute has, since its inception, been targeted at institutions that convey a message of nondiscrimination, and no others. The injunction in *Burt* barring enforcement of the Solomon Amendment has allowed Yale Law School students to receive and express once again the law school's message of nondiscrimination, and this Court should affirm the extension of that protection to students at similarly situated educational institutions like the plaintiff schools in *FAIR*.

SUMMARY OF ARGUMENT

The nondiscrimination policy at Yale Law School, which directly benefits *amici*, has protected gay and lesbian students from discrimination for over 25 years. The government seeks to change this by forcing the school to abandon its longstanding message of, and commitment to, nondiscrimination so that military recruiters can receive special treatment in a school-run and privately-funded recruiting program. This case is not about the military regulating its own personnel and internal affairs but rather about its unconstitutional attempt to coerce private actors at private institutions in violation of their First Amendment rights. Thus, *amici* respectfully submit that the Solomon Amendment violates *amici's* right to freedom of association and their right to receive information, as protected by the First

Amendment, and also unconstitutionally chills *amici's* freedom of speech.

ARGUMENT

I. The Principle And Practice Of Nondiscrimination At Yale Law School

Yale Law School, like many of the law school members of FAIR, has a longstanding policy of speaking out against, and protecting students from, discrimination. In 1978, law student Robert Weiss approached Professor Owen Fiss "about the fact that the Law School's written nondiscrimination policy did not bar discrimination against gays." Declaration of Owen Fiss, dated Apr. 1, 2004, *Burt* case ("Fiss Decl.") ¶3. Weiss told Fiss that "he and other gay students at the Law School felt excluded from the academic community because, while the Law School's policy was to protect most minority students, it did not even address the issue of sexual orientation." *Id.* Weiss's urgings spurred the law school faculty "to amend the nondiscrimination policy to include protection against discrimination on the basis of sexual orientation," thereby sending the message "that the Law School treated discrimination based on sexual orientation with the same moral seriousness with which we addressed other forms of discrimination." *Id.* ¶¶5, 6.

The school's nondiscrimination policy does more than convey a message of nondiscrimination and protect students from employers who discriminate on the basis of sexual orientation. The policy also governs admission procedures, scholarship grants, housing assignments and grading methods. Burt Decl. ¶6. In short, it has become an indelible part of Yale Law School, and it infuses all aspects of the students' experiences at the school. The nondiscrimination policy is critical to the maintenance of an atmosphere that fosters open discourse and groundbreaking legal

research, Declaration of William N. Eskridge, Jr., dated Sept. 18, 2003, *FAIR* case ("Eskridge Decl.") ¶¶3, 12, 18, 20, as well as to the inculcation of "the values that are central to law—such as justice, equal treatment, liberty and due process." Burt Decl. ¶¶2, 3-5. Student members of *amici* chose to attend Yale Law School recognizing that they were there to learn "not only legal rules, but also standards of conduct, ethics and values for practical application in the professional world." Declaration of Fadi Hanna, dated Feb. 18, 2004, *SAME* case ("Hanna Decl.") ¶8.

Consistent with the nondiscrimination policy, the Career Development Office ("CDO") at Yale Law School requires every employer seeking to participate in the law school's official interview program to sign a nondiscrimination statement, pledging not to discriminate on any of the bases protected by the policy, including sexual orientation. Any employer who refuses to sign the statement may not participate in the official interview program. *See* Declaration of Barbara Safriet, dated Apr. 5, 2004, *Burt* case ("Safriet Decl.") ¶¶3-5; Declaration of Theresa Bryant, dated Apr. 5, 2004, *Burt* case ("Bryant Decl.") ¶¶3, 6. Because the military refuses to sign the statement, it, like any other employer that does not sign, is not allowed to interview in the school-sponsored program. *See* Bryant Decl. ¶6; Safriet Decl. ¶¶3-6 (in the 1990s, the Christian Legal Society did not participate in the interview program after it refused to sign the nondiscrimination policy but participated in on-campus debate about discrimination). Thus, the military, in trying to gain greater access than that afforded to other discriminatory employers, seeks special, rather than equal treatment. *See* Declaration of Adam A. Sofen, dated Feb. 18, 2004, *SAME* case ("Sofen Decl.") ¶6 ("No other employer who would refuse to hire me because I am gay is permitted to participate as JAG does.").

The enforcement of this policy does not, as some have argued, prevent students from hearing the military's message or from associating with military recruiters. Students may invite any outside group, including the military, to speak on campus. Safriet Decl. ¶¶ 9-10. Moreover, Yale Law School explicitly permits employers who are interested in contacting and recruiting students directly to do so, without requiring the employer to sign the nondiscrimination statement. *Id.* ¶7. The CDO advises students to use the National Association for Law Placement Directory, which is available online at no cost and provides information on prospective employers, including the military. Bryant Decl. ¶4. Neither the Yale Law School administration nor its nondiscrimination policy can, nor seeks to, prevent the military from directly accessing, contacting, recruiting, interviewing or hiring Yale Law School students. The military is simply prohibited from participating in the school's official recruiting program because its presence with nondiscriminatory employers violates the nondiscrimination policy. *See, e.g.*, Declaration of Matthew Alsdorf, dated Feb. 18, 2004, *SAME* case ¶¶ 3-5.

The nondiscrimination policy is not just an esoteric creature of the ivy tower, as some proponents of the Solomon Amendment suggest, *see, e.g.*, 140 Cong. Rec. H3860-63 at H3863 (May 23, 1994) (statement of Rep. Pombo), but is rather a policy borne out of real world experiences and concerns. The nondiscrimination policy protects members of SAME and OutLaws from the type of discrimination that many have faced in other contexts. When selecting a law school, these students chose to attend Yale Law School in great part because of the high value it placed on promoting nondiscrimination on the basis of sexual orientation. Fadi Hanna was denied an interview with a consulting firm, which had previously recruited him, after he came out as a gay man. Hanna Decl. ¶6. When Fadi asked why the firm

would no longer offer an interview, the recruiting department told him simply that he "wouldn't fit in well." *Id.* As Fadi explained in the district court: "It was important to my decision [to attend law school] that Yale Law School had such a [nondiscrimination] policy and that the gay and lesbian students with whom I spoke were comfortable at Yale Law School." *Id.* ¶5. In her former employment, Heather Sias, a recent graduate of the school, "encountered discrimination against gay men and lesbians, mostly in the form of inappropriate and immature comments made by coworkers." Declaration of Heather Sias, dated Feb. 19, 2004, *SAME* case ¶2. Because of this experience, Heather "was interested in attending only those law schools with active and accepted gay and lesbian communities." *Id.* ¶¶2-3.

The importance of this policy and its message of nondiscrimination is further highlighted by the experience of Elizabeth Hillman, a former Yale Law School student who, prior to law school, had served in the military. *See* Declaration of Elizabeth L. Hillman, dated Apr. 7, 2004, *Burt* case ("Hillman Decl.") ¶¶1-2. Elizabeth, who had received awards and commendations during her service, "resigned because as an Air Force officer and a lesbian, [she] could not speak her mind or explain [her] life in an open and honest way." *Id.* ¶3. At Yale Law School, she recounts:

> I found for the first time in my professional career an open and tolerant community. I met openly gay graduate students on my first visit to campus; I attended an open meeting of Gay, Lesbian, Bisexual and Transgendered organizations...
>
> I was only able to speak and write openly because the Law School created an atmosphere in which I felt confident that I could express my views about the

> military's policy, and about other political and social issues, without fear of reprisal or intimidation. . .
>
> The existence and enforcement of the Law School's nondiscrimination policy made an enormous difference to me: it allowed me . . . to take a public stand on issues I considered critical to my personal life, my professional career, and to larger issues of social justice.

Id. ¶¶ 5, 8-9. It is a testament to the policy's efficacy that Elizabeth found a welcoming academic environment at Yale Law School.

Amici's interest in the nondiscrimination policy's message and enforcement, however, is not limited to those gay and lesbian students whom it directly protects but also includes their heterosexual counterparts, who deeply value the school's policy and perceive its enforcement as central to Yale Law School's academic message and pedagogical mission. As one heterosexual student has explained, "[t]he nondiscrimination policy is one of the ways in which Yale Law School has conveyed to me the importance of the principle that individuals should not be judged on the basis of arbitrary personal characteristics." Declaration of John Tye, dated Feb. 17, 2004, *SAME* case ("Tye Decl.") ¶6.

Finally, the faculty's adoption of the nondiscrimination policy in 1978 was motivated by a desire to include all students, regardless of sexual orientation, as full members of the Yale Law School community, not by anti-military or anti-government motives. *See* Fiss Decl. ¶¶ 4-7; Eskridge Decl. ¶¶ 15-17. *Amici* brought suit to protect their First Amendment rights and uphold the principle and practice of nondiscrimination at Yale Law School, not to oppose the military or any of its former or current policies, other than its policy of discrimination against gay and lesbian individuals. As one student has stated: "I believe that the work

done by JAG is important and meaningful. I would support JAG participation in the Yale Law School interview program if JAG did not discriminate against my classmates who are gay or lesbian." Tye Decl. ¶8. Another member of SAME, Adam Sofen, a recent graduate who is openly gay, explained to the district court his wish, grounded in two generations of military service in his family, to have a career in the armed forces:

> Numerous members of my family have served in the armed forces. My grandfather served as an officer in the United States Navy. . . . Two of my uncles also served in the Navy. . .
>
> From a young age, a career in the military interested me. My family members' service in the Navy convinced me that military service is a profoundly honorable career . . . [and] also demonstrated to me that a career in the armed forces is a uniquely unadulterated form of national service. . .
>
> To be a member of the military would offer the opportunity to defend the [ ] freedoms and tradition of tolerance [our country espouses], a task I feel I have a duty to fulfill in some manner. Given my interest in military service, a career in the [JAG] . . . would have been an option for me, were it not for the military's "Don't Ask, Don't Tell" policy.

Sofen Decl. ¶¶2-5.

II. The Enforcement Of The Solomon Amendment Against Yale Law School

From the time the nondiscrimination policy was enacted in 1978 until 2001, the DOD did not challenge Yale Law School's recruiting program or policies or seek greater

access to the campus or students on campus. Safriet Decl. ¶¶ 5-6. In 1996, Lt. Col. Michael Child asked the Law School to explain its policy with regard to military recruiting on campus. Letter from Child to Kronman of 2/28/96 (Safriet Decl., Ex. A). Dean Barbara Safriet responded that Yale Law School was in compliance with the Solomon Amendment and that the law school provided recruitment opportunities to the military on an equal basis with other employers. *See* Eskridge Decl. ¶ 35; Safriet Decl., Ex. B. The military did not formally respond to this particular letter, but in a conversation with Dean Safriet, Lt. Col. Child indicated that the military's concerns had been satisfied, even admitting that he "was wrong as to his initial perceptions" of the recruiting program and the military's access to students. *See* Safriet Decl. ¶ 10. The nondiscrimination policy was left unchallenged. *See id.* ¶¶ 6, 9-10. Similar correspondence occurred again in 1998 with the same result: the military left the nondiscrimination policy undisturbed. *Id.* at ¶¶ 11-12.

In 2001, in a sharp reversal of its stance over the previous seven years, the DOD notified Yale Law School that the Solomon Amendment allowed the DOD to "deny the use of certain federal funds" to Yale Law School should the school continue to apply its longstanding nondiscrimination policy to the military. *Burt*, 322 F. Supp. 2d at 195. The DOD further requested that the school "clarify [its] policy regarding military recruiting on the campus of Yale University as well as Yale Law School." *Id.* (citation omitted) (quoting Letter from Moore to Kronman of 3/16/98 ("Moore Letter") (Joint App. at 103)). On the basis of Yale's response, the letter promised that "Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract." *Id.* (quoting Moore Letter (Joint App. at 104)). Despite discussions between Yale Law

School and the DOD, in May 2002, Colonel Tate informed Yale that "[u]nless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements . . . we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial." *Id.* (quoting Letter from Tate to Levin of 5/29/02 (Joint App. at 112)).

The government has characterized this request, and similar requests at other schools, as seeking "equal treatment" with other employers. Letter from Carr to Levin of 5/29/03 ("Carr Letter") (Joint App. at 129). But there is nothing "equal" about it. Rather than seeking equal treatment, the government insists on special treatment because it expects to be treated better than other employers who fail to sign the nondiscrimination statement. Two state supreme courts have found that military recruiters cannot, under the guise of "equal treatment," demand entry into recruiting events that exclude discriminatory employers. *See Gay & Lesbian Law Students Ass'n v. Bd. of Trs.*, 673 A.2d 484, 493 (Conn. 1996) (state statute "requires that the law school treat military and nonmilitary recruiters alike and because the law school must ban nonmilitary recruiters who discriminate on the basis of sexual orientation, the law school must similarly ban all military recruiters"); *Lloyd v. Grella*, 83 N.Y.2d 537, 547 (1994) ("Plainly, when school[s] exclude recruiters 'on the same basis,' like those who statedly discriminate against homosexuals, the statute's special admittance pass for the military . . . does not override the even-handed exclusion of all employers who proclaim their discriminatory policies."). The logic of these decisions is compelling.

As a direct consequence of Colonel Tate's threat, the Yale Law School faculty, faced with the prospect of the uni-

versity losing hundreds of millions of dollars each year, voted to suspend its nondiscrimination policy temporarily in order to comply with the DOD's demands. Burt Decl. ¶¶20-21. Despite this concession, which, as one member of the faculty recognized, "transform[ed] our message of tolerance into an appearance of hypocrisy" and "seriously compromised" the "protective environment that [Yale Law School] sought to create for [its] students," *id.* ¶¶24, 29, the DOD was still unwilling to certify Yale Law School as compliant under the Solomon Amendment. Instead, William J. Carr, the Acting Deputy Under Secretary for Military Personnel Policy, informed the school of his belief that Yale, despite its temporary suspension of its nondiscrimination policy, remained "in violation of federal law" and warned that unless the law school changed its policy, he would "recommend . . . that Yale University be determined ineligible for Department of Defense funding." *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 at 196 (quoting Carr Letter (Joint App. at 133)).

When the faculty was forced to suspend the nondiscrimination policy under threat of funding withdrawal, Petitioners corrupted and interfered with Yale Law School's longstanding message and policy of nondiscrimination. As one student stated, "[w]hen the professors continue to permit the military to participate in the law school interview programs in violation of the nondiscrimination policy, as it is written, they fail to live by the principles they propound in the classroom and elsewhere." Declaration of Lea Bishop, dated Feb. 18, 2004, *SAME* case ¶4. Kenji Yoshino, a former student and current professor at Yale Law School, observed that "the fact that the military is allowed to discriminate against my students with the forced assistance of the Law School makes it impossible for me properly to communicate and teach the values of equality and justice

that are essential to the law." Declaration of Kenji Yoshino, dated Apr. 7, 2004, *Burt* case ¶ 8. He is troubled that the inevitable result of this government coercion was that "[t]he Law School is not the place it was when I was a student, and the educational experience is not the same." *Id.*

For these various reasons, Yale Law School students have vigorously opposed the government's decree that the school abandon its First Amendment rights by dismantling the nondiscrimination policy. Students have protested in a variety of ways, including distributing pins and pamphlets at recruiting events to express support for the nondiscrimination policy, marching with students' mouths gagged to express the silence imposed by the application of the Solomon Amendment, and draping the Law School's walls in black to protest the DOD's unconstitutional actions. *See* Cohen Decl. ¶¶ 13-14; Fiss Decl. ¶¶ 10-11.

III. The Solomon Amendment Is Unconstitutional

A. The Solomon Amendment Unconstitutionally Infringes *Amici's* First Amendment Rights

1. *Amici's* Right To Expressive Association Has Been Violated

Both the Third Circuit and the district court in *Burt* correctly held that the Solomon Amendment is unconstitutional because it violates the right to freedom of association. The Supreme Court has long recognized that a right to associate "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and

in shielding dissident expression from suppression by the majority."). To find that a statute violates the right to expressive association, a court must determine that an expressive association exists, that the government's action has significantly affected the group's advocacy of its viewpoint and that the state does not have an interest justifying the burden imposed on the group's expressive association. *Dale*, 530 U.S. at 648-58. Under this analysis, it is clear that the Solomon Amendment violates *amici's* First Amendment rights.

The Yale Law School community is an expressive association because the school is a highly selective institution with an educational purpose, one supported and defined by its nondiscrimination policy. *See Roberts*, 468 U.S. at 620 (size, purpose, policies and selectivity are among factors which define an expressive association). Through its nondiscrimination policy, Yale Law School has communicated, and its students have received, an educational message "both expressly and by example." *Dale*, 530 U.S. at 650. That message is one of diversity and inclusion—two values this Court has recognized as vital to legal education. *See Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003) ("Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."). Moreover, universities have "experience and expertise" in determining the preferred student body make-up to further the "educational benefits that diversity is designed to produce." *Id.* at 330, 333.[3]

[3] It would be ironic to permit the law school's nondiscrimination policy to be set aside given the obvious role played by the policy in fostering diversity, the value focused on by the Supreme Court in *Grutter* as central to the educational process. 539 U.S. at 329-332 (identifying

Student members of *amici* are part of the expressive community of Yale Law School "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *See Roberts*, 468 U.S. at 622. As active members of Yale Law School, as individuals who chose to become part of this expressive community, and as the creators of the law school's message of nondiscrimination, *see* Fiss Decl. ¶¶3-5, Yale Law School students are in a unique position to advocate in favor of an even-handed application of the nondiscrimination policy. Members of SAME and OutLaws seek both to prevent the government from interfering with the school's associational rights as manifested in the application of its nondiscrimination policy and to receive the message from the school in an unadulterated form.

The DOD's threats to enforce the Solomon Amendment violate Yale Law School's freedom of association by forcing the school to set aside its nondiscrimination policy as applied to one specific protected category. The DOD's actions "unconstitutionally burden this freedom" by their "intrusion into the internal structure or affairs of an association." *See Dale*, 530 U.S. at 648 (citation omitted). Requiring an institution to change one of its governing rules surely qualifies as such an intrusion. *See* Carr Letter (Joint App. at 133) (accusing Yale Law School of violating federal law because it had "waived its [nondiscrimination] policy with respect to participation in the interviewing

---

educational benefits derived from diversity). Indeed, the Court noted the amicus brief of high ranking retired officers and civilian leaders of the U.S. military which discussed the importance of diversity. *Id.* at 330. *See also* Consolidated Brief of Becton et al., *Grutter v. Bollinger*, 2003 WL 1787554 at *8 (2003) (Nos. 02-241, 02-516) (quoting George Washington in underscoring "the vital importance of direct association among diverse individuals in education and in the profession of arms").

program" twice, but had pointedly "decline[ed] to *suspend permanently* the application of its policy to the military") (emphasis added).[4] Furthermore, this intrusion into Yale Law School's governing principles incontrovertibly alters the school's message on an important political issue, "impair[ing] the ability of the group to express those views, and only those views, that it intends to express." *Id.*; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (overturning liability judgment, emphasizing "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues") (citation omitted).

As the Court has explained, "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648; *cf. Roberts*, 468 U.S. at 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."). Here it is no different; Yale has "been forced to permit a discriminatory employer to participate in [its] recruiting program alongside all of the other employers who have pledged to abide by [its] nondiscrimination policy." Burt Decl. ¶24; *see also* Hanna Decl. ¶9 ("[T]he law school's current message on non-discrimination seems to be that discrimination is permissible whenever there is a real benefit to turning a blind eye to discrimination against a particular group."). Like the boycotting consumers in *Claiborne*, 458 U.S. at 907, Yale Law School students do

---

[4] *Dale* does not stand for the sole proposition that forcing an organization to accept a member who is unwanted would impair the organization's freedom of association. The violation in *Dale* was a subset of a broader category of constitutional violations, which forbids the government from intruding into a group's internal workings and structure. 530 U.S. at 648.

not want to associate with those who discriminate, which led them to push successfully for the creation of a community that opposes all forms of discrimination, including discrimination on the basis of sexual orientation. The Solomon Amendment violates *amici's* expressive association rights and thus cannot be allowed to continue impairing Yale Law School's ability to voice its opinion on nondiscrimination, regardless of that message's acceptance in society at large.[5]

2. *Amici's* Right To Receive Information Has Been Violated

The *Burt* court was correct in its finding that the Solomon Amendment impermissibly coerced the faculty into assisting the DOD to send the government's message of discrimination. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 178 (D. Conn. 2005); *see also FAIR v. Rumsfeld*, 390 F.3d 219, 240 (3d Cir. 2004). Because the speakers of the message of nondiscrimination were unconstitutionally coerced, the rights of Yale Law School students as the intended recipients of the faculty's message of nondiscrimination in

---

[5] Under Secretary of Defense Carr characterizes Yale's nondiscrimination policy as resulting in "the message that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations that Yale permits to participate in its CDO programs." Carr Letter (Joint App. at 132). Thus, it is necessary to clarify exactly what the message of Yale Law School is. While Yale Law School respects service in the armed forces, it does, through its nondiscrimination policy, assert that the "Don't Ask, Don't Tell" policy makes the military a less than ideal career choice for a law student because of the Law School's vision of full equality for all persons regardless of sexual orientation. *See* Bryant Decl., Ex. E (CDO website listing JAG as recruiter with caveat that JAG violates the nondiscrimination policy but has forced its way into CDO programs because of the Solomon Amendment). While this view may be unpopular, it is not for the heavy hand of government to suppress it.

its unadulterated form have similarly been infringed. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (right to receive information and ideas "is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); *see also PG&E v. Pub. Utils. Comm'n of Cal.*, 476 U.S. 1, 8 (1986) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."). The Solomon Amendment accordingly violates the First Amendment rights of Yale law faculty and students, by tainting the message of nondiscrimination as spoken and as heard. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 754 (1976) (upholding challenge to statute penalizing pharmacists for advertising prescription prices given plaintiffs' right "to receive information that pharmacists wish to communicate to them through advertising and other promotional means").

The message of nondiscrimination is crucial to the law school's academic environment, which was for some students the first place where they could freely express their personal opinions. *See, e.g.*, Hillman Decl. ¶8 ("I was only able to speak and write openly because the Law School created an atmosphere in which I felt confident that I could express my views about the military's policy, and about other political and social issues, without fear of reprisal or intimidation."); *see also* Hanna Decl. ¶8 ("A law school should prepare its students . . . by teaching not only legal rules, but also standards of conduct, ethics and values for practical application in the professional world."). The academic freedom promoted by the message of nondiscrimination absent government coercion is vital to students, not just professors. *See Keyishian v. Bd. of Regents of the Univ.*

of the State of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ."). Indeed, Yale Law School students have long viewed nondiscrimination as a value so central to the school's mission that they were instrumental in the adoption of the nondiscrimination policy and in the continuing pressure to maintain it.

Now, rather than receiving Yale Law School's message of nondiscrimination, Yale Law School students are told that discrimination on the basis of sexual orientation is negotiable. As explained by recent graduate Michael Kavey, the message currently transmitted is "that discrimination based on sexual orientation is less objectionable than other forms of discrimination." Kavey Decl. ¶ 11. As the *Burt* court recognized, this is not the message that Yale Law School wants to send to its students. *Burt*, 354 F. Supp. 2d at 178 (Solomon Amendment forced faculty to change message from categorical statement in favor of nondiscrimination into "an equivocal statement that includes the disclaimer" exempting the military). Such interference with the message received by the students is no more permissible under the First Amendment than was the removal of books from school library shelves in *Pico*, 457 U.S. at 853, or the prohibition on price advertising in *Virginia State Board*, 425 U.S. at 754. In all of these situations, the government has interfered with a message that a willing speaker wants to send to a willing listener.

3. The State Interest Does Not Satisfy Strict, Or Even Intermediate, Scrutiny

Where laws directly impact upon a speaker's First Amendment rights, the government's conduct can be upheld only if it serves "compelling state interests, unre-

lated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648; *Roberts*, 468 U.S. at 623. The burdens on students' First Amendment rights should be subject to the heightened scrutiny that was applied in *Dale* or *Roberts*, not only because of the serious First Amendment issues regarding the students' right to receive the law school's message, but also because these cases control the analysis for measuring the burdens on students' right to expressive association. Moreover, student *amici* are entitled to extra consideration under the doctrine of academic freedom. *See supra* at III.A.1; *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). The law necessarily falls under strict scrutiny analysis.

The court in *Burt* and the Third Circuit correctly determined that the Solomon Amendment did not meet the narrow tailoring requirement, finding that "the military has ample resources to recruit through alternative means." *Burt*, 354 F. Supp. 2d at 182 (citing *FAIR*, 390 F.3d at 234).[6] First, at Yale Law School, the military has never

---

[6] In addition, the penalty imposed falls short of meeting strict scrutiny because the government's threat to withhold, in the 2002-2003 fiscal year alone, nearly $300 million in funding, used in part for biomedical research on cancer, AIDS and asthma (but not for recruitment or placement of any students with an employer), *see* Declaration of John Maloney, dated Apr. 15, 2004, *Burt* case ¶¶ 4, 18, 20, Ex. A, is anything but a means "significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648; *Roberts*, 468 U.S. at 623. The school could sacrifice its own educational message, or risk the loss of funding to the university, a separate institution. In passing this law, the government knew that law schools were presented with such a choice. 140 Cong. Rec. H3860-63, at H3861 (May 23, 1994) (statement of Rep. Solomon) (declaring that the statute would "tell[] recipients of Federal money at colleges and universities that if you do not

been denied access to students. To the contrary, military recruiters are welcome on campus at the invitation of a single student or student group, and the names and contact information for every student are made available to JAG, which remains free to contact the students directly. Safriet Decl. ¶¶ 7-8; Bryant Decl. ¶¶ 10-11. This fact alone amply demonstrates the marked failure of the government to tailor the law narrowly since the DOD has at its disposal a panoply of less speech-restrictive means of recruitment, including not only access to contact information for each student (allowing recruiters potentially to speak with all students as opposed to meeting only those students who sign up for a JAG interview) but, as the Third Circuit noted in *FAIR*, loan repayment programs and sophisticated media campaigns. *FAIR*, 390 F.3d at 235. Likewise, no weight should be accorded to *amicus* Judge Advocates General Association's claims that JAG recruiting is far more effective when face-to-face meetings occur since they are essential to the recruiting process. *See* Judge Advocates Brief at 14-15. No one prevents the military recruiters from conducting face-to-face interviews with Yale Law School students. Moreover, as Judge Hall aptly observed in *Burt*, "approximately 50% of Yale law school students obtain employment as judicial law clerks [in] a recruiting process that does not use the [official recruitment] program or any form of on-campus recruiting," significantly

---

like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights. [sic] But do not expect Federal dollars to support your interference with our military recruiters."). Forcing the school to abandon its own principles and message is an infringement on its First Amendment rights, which cannot be justified by the state's articulated interest. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996) (constitutional violation where government makes "a concerted effort to coerce [the] relinquishment [of protected constitutional rights]").

undercutting the military's "assertion that access to the [recruitment] program is necessary to law school recruiting." *Burt*, 354 F. Supp. 2d at 182 n.27.

Second, requiring any greater degree of access to students is not justified by a compelling state interest under First Amendment principles. While defendant may contend that being part of the official interview program is more convenient, mere convenience is not a compelling government interest. *See Searcey v. Crim*, 642 F. Supp. 313, 317 (N.D. Ga. 1986), ("[T]here has been no showing that the military lacks alternative means of contacting high school students; the mere convenience of contacting them at high schools is not a compelling state interest."), *aff'd in part, vacated in part*, 815 F.2d 1389 (11th Cir. 1987).

Third, despite the fact that military recruiters have participated in Yale Law School's official interview program from fall 2002 through fall 2004, few students have signed up for interviews and not a single student interviewed has been offered, nor accepted, a position with the military through the official law school recruiting program. *Burt*, 354 F. Supp. 2d at 182; Bryant Decl. ¶15. Notwithstanding this abject failure, the military insists on continuing to recruit at Yale Law School, yet in contrast, schools with policies "of pacifism based on historical religious affiliation," are exempt from the application of the Solomon Amendment. 10 U.S.C. §983(c)(2). Pacifist schools, however, do not restrict their enrollment to pacifists, or even to students of a single faith,[7] and their graduates serve in the military just like those of any other school. *See, e.g.*, *Obituaries*, Kan. City Star, Apr. 22, 2003 at B4 (Joseph Samuel Balestrieri served in the Army during World War II, grad-

[7] *See, e.g.*, http://www.earlham.edu/policies/rel-life.html (policies of pacifist Earlham college noting that "Earlham is made up of people of various faiths and religious practices and people of no religious faith").

uated from Earlham College in 1947 and worked for 23 years for the U.S. Air Force). This mismatch is the inevitable result of Congress' arbitrary determination to respect the First Amendment views of schools with a pacifist message but not those of schools with a message of nondiscrimination. Given that Congress has concluded that the military can recruit effectively while respecting a school's pacifist views, the government's position here is all the more suspect. The Court should find that the Solomon Amendment is not narrowly tailored and, therefore, is unconstitutional.

Finally, even when the government tries to regulate less protected forms of speech, the Court explicitly requires that the restriction actually foster the government's interest. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300-01 (2000) (regulation of symbolic conduct must further the government's interest); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (where a law burdens commercial speech, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the government defends a regulation on speech as a means to . . . prevent anticipated harms it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way."). Thus, even if subjected to intermediate scrutiny, the Solomon Amendment must fail because its infringement of plaintiff's First Amendment rights does not actually achieve the government's interest of recruiting law students.

B. The Solomon Amendment Unconstitutionally Chills Speech

The Constitution makes clear that "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) (citations omitted). The problem of "unconstitutional vagueness is further aggravated where . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Id.* at 372 (applying vagueness doctrine in First Amendment context). Here, as organizations interested in protesting the military's participation in Yale Law School's recruitment program, *amici* have no way to ensure that the exercise of their free speech rights will not result in the violation of the Solomon Amendment. The law is therefore void for vagueness and accordingly, should be declared unconstitutional.

The statutory language permits the Secretary of Defense to deny funding to the university if he determines that Yale Law School "has a policy or practice . . . that either prohibits, or in effect prevents [military recruiters] . . . from gaining access to campuses, or access to students . . . that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. §§ 983(b)-(b)(1) (2004). Military officials and members of Congress have explicitly contemplated that the requirement of access "at least equal in quality and scope" can (and should) be used to curb protected First Amendment activities such as student protests. *Id.* at (b)(1). David S. C. Chu, Under Secretary of Defense, advocated for the inclusion of this language to spare military recruiters and prospective recruits who "have been forced to endure verbal abuse and harassment, gauntlets of

taunting fellow students and faculty impeding the path to designated interview rooms." H.R. Rep. No. 108-433, pt. 1, at 7 (2004). Representative Howard McKeon, arguing that the statute was necessary to prevent students from engaging in protests, reported that "[s]hockingly, at one of the most prestigious colleges in this country, . . . potential recruits were harassed and detained by protestors.'" 150 Cong. Rec. H1702-01, at H1705 (daily ed., Mar. 30, 2004) (statement of Rep. McKeon).

Amici "protested when the military recruited at the Yale Law School interview programs in the fall of 2002, the spring of 2003 and the fall of 2003," Cohen Decl. ¶ 13, and will seek to continue to demonstrate so long as the government forces Yale Law School to abandon its nondiscrimination policy. Hanna Decl. ¶ 12 ("SAME's planned activities include protesting military participation in Yale Law School interview programs."). Given the vague statutory language and the continuing interest of students to exercise their free speech rights, *amici* face a one-two punch in that the Solomon Amendment both fails to provide sufficient notice of the conduct it forbids and also establishes guidelines for application that encourage arbitrary and discriminatory enforcement. Can students protest? What if universities let students protest? What if the schools do not let students protest, but the students protest anyway? What if a university itself speaks out against the law?[8] *See, e.g.*, H.R. Rep. 108-443, pt. 1, at 17

[8] Indeed, the Third Circuit determined that "the Solomon Amendment, as recently amended, does not appear to permit law schools to disclaim the military's message." *FAIR*, 390 F.3d at 240. The Third Circuit reasoned that because of the requirement of access "equal in quality and scope" to that provided nondiscriminatory employers, "[a]s the law schools do not disclaim the messages of those employers, similarly they may not disclaim the message of the military." *Id.* at 240-41.

(noting that a DOD determination that a school is not in compliance with the law "will involve murky comparisons of the totality of the conditions for access . . . [which] may involve some factors beyond the control of the educational institution, for example, the actions of protestors") (Rep. Jim Marshall). The Solomon Amendment affords no solace to a student protester (nor a school administrator) that her exercise of her free speech rights will not endanger an entire institution's federal funding, a concern exacerbated by the fact that the Secretary of Defense acts as "prosecutor, judge and jury" in making "equal access" determinations. H.R. Rep. No. 108-433, pt. 1, at 17. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion) (striking down for vagueness an anti-loitering law, where "it may authorize and even encourage arbitrary and discriminatory enforcement"). There is no way, then, that *amici* can be certain their behavior conforms to the nebulous dictates of the Solomon Amendment. Because laws cannot constitutionally require speakers like *amici* to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked," *Baggett*, 377 U.S. at 372-73 (citations omitted), the Solomon Amendment is unconstitutionally vague.

The Solomon Amendment leaves open the possibility that Yale University could lose its funding even as a result of the most benign statement against discrimination in the military or in favor of nondiscrimination at Yale Law School. For instance, Yale Law School students participating in the CDO interview program could wear rainbow ribbons as a sign of solidarity with their gay and lesbian classmates who are without the protection of the nondiscrimination policy. Millions of dollars in funding to Yale University would be lost if the Secretary of Defense found that other employers were not the objects of similar

protests, thereby rendering the military recruiters' access "unequal." Moreover, even if the DOD never denied funds on this basis, the damage to *amici's* First Amendment rights would already be done. *See NAACP v. Button*, 371 U.S. 415, 435 (1963) ("It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.").

Finally, the DOD has utilized its statutory discretion to its distinct advantage, threatening the withdrawal of funding of almost $300 million from Yale University without making an actual final determination. The military, after all, indicated to President Levin of Yale University in 2003 that "despite more than two years of correspondence, meetings, and negotiations, [it] still did not have enough information" to determine whether Yale Law School had complied with the Solomon Amendment. *See Burt*, 354 F. Supp. 2d at 170. A further exchange of detailed information resulted only in another year without a "determination." *Id.* The result has been to subject Yale Law School and the entire university to the whims of the DOD. The Constitution does not permit the military to dangle the Solomon Amendment like the sword of Damocles over Yale Law School to force both the school and its students into forms of speech and conduct with which the military agrees. This is the height of arbitrariness. Accordingly, the Court should declare the law unconstitutional.

CONCLUSION

As an expressive association, the Yale Law School community has made a commitment to equality for a long-persecuted minority. It has chosen to regulate its private, internal matters pursuant to this commitment, including banning the military, a discriminatory employer, from the

official, school-run recruiting program. And for this "expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values," *Texas v. Johnson*, 491 U.S. 397, 411 (1989), the government seeks to punish Yale Law School with the Solomon Amendment. But the "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). For the reasons stated above, *amici*, as members of the Yale Law School community and as speakers in their own right, respectfully ask the Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

CARMINE D. BOCCUZZI, JR.
Counsel of Record
CATHARINE M. CLARK
KYLE C. WONG
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000